BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH HADDEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 173,968
ARTEX MANUFACTURING COMPANY	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier requested review of the Award dated April 25, 1996, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on October 1, 1996.

APPEARANCES

Jack Shelton of Wichita, Kansas, appeared for the claimant. William L. Townsley, III, of Wichita, Kansas, appeared for the respondent and its insurance carrier. Robert V. Talkington of Iola, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Appeals Board has considered the medical and

miscellaneous records which the parties placed into evidence by stipulations dated August 10, 1995, and September 19, 1995.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 50 percent work disability and denied respondent's request to assess liability against the Workers Compensation Fund. Respondent and its insurance carrier requested the Appeals Board to review the following issues:

(1) Did claimant's accidental injury arise out of and in the course of employment with respondent?

(2) What is the nature and extent of claimant's injury and disability?

(3) What is the liability of the Workers Compensation Fund?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant graduated from high school in 1975 and began working for the respondent as a seamstress in 1978. Claimant's job required her to twist at the waist approximately 2,880 times per day.

(2) Before working for respondent, claimant experienced back problems for a number of years. She began chiropractic treatment when she was 16 years old and in 1977 began treatment on an almost yearly basis. While working for respondent, claimant gradually noticed her low back would hurt when she went home at night. On April 2, 1991, claimant turned to place a pair of shorts on a cart and experienced severe pain in her low back. At the regular hearing, the parties stipulated claimant sustained personal injury by accident on April 2, 1991. However, the respondent and its insurance carrier denied that the accidental injury arose out of and in the course of claimant's employment with respondent.

(3) After a period of conservative treatment, in June 1991 claimant returned to work on light duty. At that time, claimant returned to her regular job and despite continuing back soreness was able to tolerate it until August 1991 when her symptoms increased. Orthopedic specialist David O. King, D.O., took claimant off work again and prescribed physical therapy and ultrasound. In December 1991, claimant returned to work on light duty on a part-time basis. After several weeks of part-time work, Dr. King released claimant to return to her regular job duties but advised her not to lift greater than 20 pounds or sit for more than 2 hours at a time.

(4) After December 1991 claimant performed her regular seamstress duties and continued to see Dr. King on a monthly basis. In August 1992, claimant's back symptoms worsened again. After being off work for two weeks, claimant returned to work until Dr. King again took her off work in late January 1993. At the time of regular hearing in 1994, claimant continued to take pain medications for her back as prescribed by her authorized treating physician.

(5) Since leaving work on or about January 31, 1993, claimant has neither worked nor looked for employment. After January 1993, claimant did not return to respondent to discuss her work options. According to vocational rehabilitation consultant Karen Terrill, in January 1995 claimant began receiving social security disability benefits.

(6) Dr. King, the physician who provided most of claimant's treatment, testified claimant had spondylolysis, a bony defect in the lumbar vertebrae at the L5 intervertebral space. He did not find spondylolisthesis which is actual forward slippage of the vertebral body. Dr. King's final diagnosis was lumbar syndrome with interspinous ligament strain and spondylolysis. He did not believe claimant could return to work in a sewing factory as claimant needed some type of light, sedentary work which would allow her to frequently change positions. Based upon the results of a functional capacity assessment, Dr. King believes claimant is limited in her ability to remain in one position for more than 15 minutes even on a good day whether it be sitting, standing, or walking. He testified claimant has an 8 percent whole body functional impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

(7) Respondent and its insurance carrier referred claimant for evaluation by board certified physical medicine and rehabilitation physician Vito J. Carabetta, M.D. Dr. Carabetta examined claimant in March 1993 and found that she had either congenital or developmental spondylolysis at the L5 intervertebral space. For the spondylolysis, he rated claimant as having an 8 percent whole body functional impairment. The record is unclear how the doctor utilized the AMA Guides in determining claimant's functional impairment rating or, if considered, which edition was used. The doctor testified claimant has symptom magnification and her present symptomatology is caused by the spondylolysis rather than the lumbar sprain which he believes claimant suffered in April 1991 and which he believes has since resolved. He also believes claimant could return to her former job duties as a seamstress if she were not required to rotate her trunk.

(8) Board-certified orthopedic surgeon Ely Bartal, M.D., also testified. He saw claimant in October 1993 and also diagnosed spondylolysis at L5. He believed, as did Dr. Carabetta, that claimant sprained her low back as a result of the April 1991 accident but her present problems were mainly due to the spondylolysis rather than the sprain. He rated claimant as having a 5 percent whole body functional impairment due to the spondylolysis but there is no indication whether he used the AMA Guides. Dr. Bartal also believes claimant should be restricted from lifting greater than 40 pounds and repetitive bending, stooping, kneeling, and twisting.

(9) The Administrative Law Judge referred claimant to board-certified physical medicine physician Philip R. Mills, M.D., for an independent medical evaluation. He saw claimant in March 1996. After reviewing numerous medical records from previous health care providers, Dr. Mills determined that claimant had chronic low-back pain secondary to a sprain rather than the spondylolysis which appeared to be stable. Using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), he believes claimant has a 5 percent whole body functional impairment. He also found symptom magnification and believed claimant should avoid twisting, bending, and forward flexion.

(10) The Appeals Board finds that despite her April 1991 accidental injury and her ongoing symptoms, claimant retains the ability to perform light, sedentary work as long as she refrains from lifting greater than 20 pounds and from repetitive twisting, bending, and forward flexion. But for the frequent trunk rotation, claimant could perform the seamstress job she performed for respondent. Unfortunately, neither of the vocational rehabilitation counselors who testified performed an analysis of claimant's loss of ability to perform work in the open labor market or loss of ability to earn a comparable wage utilizing the restrictions and limitations which the Appeals Board finds appropriate. Therefore, averaging the opinions of James Molski and Karen Terrill which were produced by analyzing the divergent restrictions of Dr. King and Dr. Bartal, the Appeals Board finds claimant's loss of ability to perform work in the open labor market is 48 percent.

(11) At the time of the April 1991 accident, claimant was earning $4.60 per hour or $184 per week. The Appeals Board finds claimant retains the ability to earn, at least, the present federal minimum wage of $5.15 per hour which equates to a weekly wage of $206. Therefore, claimant has not lost any ability to earn a comparable wage despite her loss of ability to perform numerous jobs.

(12) Before April 1991, respondent had knowledge that claimant often needed back treatment and that it would sometimes require her to miss work. In 1980 claimant was hospitalized for several days with low back pain. In 1981, claimant again returned to the hospital for treatment by traction. From 1977 through 1990, claimant almost annually required and obtained chiropractic treatment for her back symptoms. The Appeals Board finds claimant's back condition before April 1991 was of such character as to constitute a handicap in obtaining or retaining employment. The Appeals Board finds claimant's low back was permanently aggravated by her April 1991 accident and that the aggravation and resulting disability would not have occurred but for the preexisting spondylolysis.

CONCLUSIONS OF LAW

(1) Claimant injured her back on April 2, 1991, when she turned to place a pair of shorts on a cart. The Appeals Board finds claimant's accidental injury arose out of and in the course of her employment with the respondent. There is no question the injury occurred while claimant was performing her job duties and one of the many trunk twists and turns which she regularly performed throughout the work day.

Because claimant suffered from spondylolysis before the April 1991 accidental injury, respondent and its insurance carrier seem to argue that claimant's employment did not cause or contribute to the injury and, therefore, claimant's injury did not arise out of her employment. The Appeals Board disagrees with that analysis and finds that claimant's accidental injury did occur while she was performing her regular job duties. Therefore, the back injury arose out of the incidents and obligations of claimant's employment.

(2) Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 1990 Supp. 44-510e which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

The principal issue in this proceeding is whether claimant sustained permanent injury or permanent aggravation of her preexisting spondylolysis as a result of the April 1991 accidental injury. Based upon the medical evidence presented, the Appeals Board finds that claimant sustained a back sprain superimposed upon the spondylolysis as a result of the April 1991 incident. The Appeals Board also finds claimant's ongoing back symptoms are the result of that accident and that the accident permanently aggravated claimant's back.

The Appeals Board finds claimant's whole body functional impairment rating falls between the 5 percent provided by Dr. Mills and the 8 percent provided by Dr. King. Therefore, the Appeals Board finds claimant's whole body functional impairment is 7 percent.

The Appeals Board also finds claimant retains the ability to perform light, sedentary work as long as she refrains from lifting greater than 20 pounds and from repetitive bending, twisting, and forward flexion. Were it not for the frequent twisting and trunk rotation, claimant could perform the seamstress position she held while working for the respondent.

In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Court of Appeals held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job which the employer had offered. The Court

reasoned the legislature clearly intended for a worker not to receive compensation for a work disability when the worker was still capable of earning nearly the same wage. At page 284 of its opinion, the Court stated:

> Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker has refused to even attempt the job. **The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage.** Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage. (Emphasis added.)

The Foulk principles were somewhat expanded in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997), where the Court held that an injured worker was required to make a good faith effort to find appropriate employment before the fact-finder could consider the actual difference in pre- and post-injury wages as required by K.S.A. 44-510e(a). In Copeland, the Court stated:

> The court in *Foulk*, 20 Kan. App. 2d 277, Syl. ¶ 4, stated it would be unreasonable for the courts to conclude the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. The highlighted fact in *Foulk* was that the employer proffered a job within the worker's ability and the worker refused to even attempt the job. As discussed in the first issue, those facts are a *[sic]* not currently before this court. Although *Foulk* dealt with a pre-1993 version of 44-510e(a), the general principles established in *Foulk* would presumably apply to a case falling under the current version of 44-510e(a).
>
> In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk*, we find the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages based on the actual wages can be made. This may lead to a finding of lesser wages, perhaps even zero wages, notwithstanding expert opinion to the contrary.
>
> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on

all the evidence before it, including expert testimony concerning the capacity to earn wages.

In applying the underlying principles of both Foulk and Copeland, the Appeals Board finds claimant had the duty to seek appropriate employment after leaving respondent's employ. Claimant has not sought any employment since leaving respondent and, therefore, has not demonstrated a good faith effort in finding an appropriate job. Also, because claimant retains the ability to earn a comparable wage to that which she was earning on the date of accident, the presumption of no work disability as contained in K.S.A. 1990 Supp. 44-510e is applicable the same as if claimant was actually earning those wages. Therefore, the presumption of no work disability is applicable. The Appeals Board finds the presumption has not been overcome and claimant's permanent partial disability benefits are limited to those of her functional impairment rating.

Based upon the above, claimant is entitled to receive permanent partial disability benefits for a 7 percent whole body functional impairment.

(3) The Workers Compensation Fund is responsible for the entirety of the award. Before April 1991 respondent had knowledge that claimant had an impairment to her back which often required medical treatment and forced her to miss work. Based upon the extensive treatment claimant received in the years before 1991, the Appeals Board finds that the impairment arising from claimant's low-back condition constituted a handicap in obtaining or retaining employment. *See* K.S.A. 44-566.

The Appeals Board also finds the April 1991 accident permanently aggravated claimant's preexisting spondylolysis and that such aggravation and resulting disability would not have occurred but for the preexisting condition and impairment. That conclusion is based upon the testimony of Drs. Carabetta and Bartal. Under K.S.A. 1990 Supp. 44-567(a)(1), the Workers Compensation Fund is wholly responsible for all the benefits and administrative expenses associated with this Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated April 25, 1996, entered by Administrative Law Judge John D. Clark should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Deborah Hadden, and against the respondent, Artex Manufacturing Company, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred April 2, 1991, and based upon an average weekly wage of $184 for 46.71 weeks of temporary total disability compensation at the rate of $122.67 per week or $5,729.92,

followed by 368.29 weeks at the rate of $8.59 per week or $3,163.61, for a 7% permanent partial general disability, making a total award of $8,893.53.

As of December 10, 1997, there is due and owing claimant 46.71 weeks of temporary total disability compensation at the rate of $122.67 per week or $5,729.92, followed by 302.43 weeks of permanent partial disability compensation at the rate of $8.59 per week in the sum of $2,597.87 for a total of $8,327.79, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $565.74 is to be paid for 65.86 weeks at the rate of $8.59 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jack Shelton, Wichita, KS
William L. Townsley, III, Wichita, KS
Robert V. Talkington, Iola, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director